Supreme Court, U.S.
FILED

991398 FEB 23 2000

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No. 00

IN THE

Supreme Court of the United States

JOHN MALOWNEY,

Petitioner,

v.

STATE OF FLORIDA
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERIORARI

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QUESTIONS PRESENTED

Does the Florida post-garnishment scheme violate the Supremacy Clause of the United States Constitution as well as the Due Process Clause by failing to protect assets that had been declared exempt from debt collection activities?

Does a disabled veteran whose sole source of income, Veterans and Social Security benefits which are exempt from garnishment have standing to challenge a constitutionally defective (notice wise) state garnishment statute after the writ of garnishment is dissolved?

Has the United States Court of Appeals for the Eleventh Circuit established a bar to future challenges to the Florida Garnishment Statute?

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Petitioner, John Malowney respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at Malowney v. Hodges, 98-2610(App.A). The opinion of the United States District Court for the Middle District of Florida (Hon. Susan Bucklew, J.) is reported at Malowney v. Kass Hodges, 96-2585(M.D. Fla.) (App. B).

STATEMENT OF JURISDICTION

The first judgment of the United States Court of Appeals for the Eleventh Circuit was entered on October 29, 1999. A suggestion for rehearing was filed on November 17, 1999, and the United States Court of Appeals for the Eleventh Circuit denied it on December 1, 1999 (App. C).

This court has jurisdiction to review the Eleventh Circuit's decision pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 6, Clause 2, Supremacy Clause of the United States Constitution provides a state law is invalid if it stands as an obstacle to accomplishment and execution of the full purpose and objectives of congress.

Notice of seizure, or attempt to seize, property of debtor is a fundamental element of the due process under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Social Security Act at 42 U.S.C. § 407 provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Florida Statute 744.626 (1984) entitled-Exemption of benefits from claims of creditors, provides:

> Except as provided by federal law, payments of benefits from the United States Department of Veterans Affairs or the Social Security Administration to or for the benefit of a disabled veteran or the veteran's surviving spouse or dependents are exempt from the claims of creditors and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt of the payments by the guardian or the beneficiary.

STATEMENT OF CASE

This case raises the question whether a disabled veteran whose sole source of income, Veterans and Social Security benefits which are exempt from garnishment, has standing to challenge a constitutionally defective (notice wise) state garnishment statute. In support of the veteran's challenge are the rulings directly on point by the First, Third, and Fourth Court of Appeals. In those cases all three judgment debtors were likewise recipients of exempt social security benefits. All three Court of Appeals found the plaintiffs did indeed have standing to seek declaratory relief. In the instant case the Middle District of Florida also found the plaintiff had standing to bring an action for declaratory relief. In addition, all three Appellant Courts as have the District Courts of New York, and Arizona ruled their

respective state statute violated the Supremacy Clause for failing to protect assets that have been declared exempt from debt collection activities.

At the heart of this challenge are two constitutional rights issues, a violation the Supremacy Clause of the United States Constitution, and a violation of the Due Process Clause of the Fourteenth Amendment.

The issue of standing only became fatal when the United States Court of Appeals for the Eleventh Circuit substituted their independent ruling that the appellant now lacks standing. The Court of Appeals did not affirm the District Court's original ruling, a ruling from which the appeal was taken, that the complaint failed to state a cause of action. Nor did they address the alleged Supremacy Clause violation. See page 5, App. A.

The appellant contends it was an error for the District Court to omit the core argument, the 20 days the garnishee has to answer the writ and simply rule that the 5 days the creditor has to notify the debtor is sufficient notice. See page 12, App. B. In addition, the District Court omitted any comment regarding the Supremacy Clause violation. Fundamental fairness requires the core argument be addressed directly as well as the Supremacy Clause issue since it was a ruling on the merits.

The appellant argues that the United States Court of Appeals for the Eleventh Circuit erred by ruling the appellant lacks standing to challenge a defective state garnishment statute. The ruling splits the circuits on the issue of standing regarding an important constitutional rights question. Furthermore, the ruling now bars any future challenge with a mootness rationale since the money was returned and the bank and creditor now know the funds are exempt, it is unlikely that another garnishment would ever occur in the future.

At oral argument, Judge Barkett of the Eleventh Circuit put the central question to the State of Florida counsel when she asked "Why does the state need 25 days to provide an official notice to the debtor?" The state had no answer to that pertinent question. It is that question that is the essence of this case.

A. Background

In 1987, a now defunct Savings and Loan, "Freedom", obtained a state court judgment against M.K. Enterprises of Tampa, Inc., now defunct, and the appellant, John Malowney. The judgment was assigned to the Resolution Trust Corporation, "R.T.C.". The "R.T.C." garnished the appellant's checking account and after many months, more than six months, the state court ruled the funds were exempt from garnishment and ordered the funds released.

In 1992, the "R.T.C." sold the "Freedom" judgment to Charles Mayall in California as a package of 1500 judgments for ½ a penny on the dollar. Mayall also received the depositions of the judgment debtor, the appellant here, that revealed the appellant's source of income was from social security and veterans disability benefits. In 1992, the Appellant spoke with Mayall in an effort to resolve the judgment. The appellant told Mayall directly his income was exempt from garnishment.

In May 1995, "Kass Hodges", a Florida law firm, employed by the fifth assignee of the judgment, First National Credit, Inc., induced the Clerk of the Circuit Court of Hillsborough County, Florida, to issue a writ of garnishment directed to the checking account of the appellant at Fort Knox, Kentucky. Army National Bank, "A.N.B." acted on the invalid writ and immediately froze the account and started bouncing checks. Appellant received nonsufficient funds, "N.S.F.", notices approximately a week later. After several calls the appellant learned of the garnishment but was not told who directed the writ. No official notice was ever provided to the Appellant.

The Appellant sued the debt collector, "Mayall" in Count III for a Fair Credit Reporting Act violation. Count II was against attorneys, "Kass Hodges" for wrongful garnishment. Count I is against the Clerk of Hillsborough County Court, Richard Ake, "Ake", for 42 U.S.C. § 1983 claim.

The Count III, "F.C.R.A." was barred by a res judicata ruling. Count II, wrongful garnishment, was refiled and settled in state court. Count I, the 1983 action is the issue of this Writ of Certiorari.

B. The Proceedings Below.

On September 22, 1997, the Middle District of Florida denied the Clerk of the Hillsborough County Court's motion to dismiss. The Court ordered the clerk to address the constitutionality of Florida's Garnishment Statute more directly. In that ruling, the Middle District of Florida cited *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

> The Federal Rules of Procedure "do not require a claimant to set out in detail the facts upon which he bases his claim." *Conley*, 355 U.S. at 47. All that is required is "a short and plain statement of the claim." Fed. R. Civ. P. 8 (a) (2). The standard on a 12 (b) (6) motion is not whether the plaintiff will ultimately prevail in his theories, but whether the allegations are sufficient to allow them to conduct discovery in an attempt to prove allegations. *Jackam v. Hospital Corp. of Am. Mideast, Ltd.*, 800 F. 2d 1577, 1579 (11th Cir. 1986).

On April 20, 1998, the Middle District of Florida granted the Clerk of the Hillsborough County Court's Motion to dismiss stating the appellant failed to state a Section 1983 claim. See App. B, page 16.

The Middle District of Florida held that the notice provision of Florida's postjudgment garnishment statute provides that, once the writ is issued and within five days of the garnishee's answer:

> [T] he plaintiff shall serve, by mail, the following documents: a copy of the writ, a copy of the answer, a notice, and a certificate of service. The notice shall advise the recipient that he or she must move to dissolve the writ within the time period set forth in § 77.07 (2) or be defaulted and that he or she may have exemptions from the garnishment which must be asserted as a defense.

The Middle District of Florida ruling completely omitted the core argument concerning Fla. St. § 77.04 Writ; form which states:

> The writ shall require the garnishee to serve an answer to it on plaintiff within **20** days after service stating whether he or she is indebted to defendant at the time of the answer, ...

On October 29, 1999, the Court of Appeals for the 11th Circuit in their published ruling stated:

> "Because the Malowneys failed to allege in their amended complaint any facts from which we could reasonably conclude that they will suffer future injury from the application of the statute they challenge as unconstitutional, we conclude they lack standing under either 42 U.S.C. § 1983 or 28 U.S.C. § 2201 to obtain declaratory relief concerning the statute, and we affirm the district court's dismissal of the amended complaint. But we base our affirmance on that ground, instead of the ground used by the district court, which was that the complaint failed to state a cause of action. (See App. B, page 5.)

Thus the 11th Court of Appeals affirmed the District Court's dismissal to the Section 1983 claim. The Court of Appeals for the 11th Circuit did not rely on the previous rulings by the 1st, 3rd, or 4th Court of Appeals in their opinion that the appellant lacked standing.

REASONS FOR GRANTING THE WRIT

The only Supreme court case to confront a postjudgment garnishment statute is that of *Endicott v. Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285, 288-89 (1924), in which the court held that New York's postjudgment garnishment statute, which provided neither notice nor a hearing, did not deprive the judgment debtor of due process. In broad language, the Court declared:

> (T)he established rules of our system of jurisprudence do not require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered

> against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment.

See page 12 of App. B.

Although outside the context of postjudgment garnishment[1], the Court, in *Mathews v. Eldridge*, 424 U.S. 319 (1979), articulated a three pronged balancing test for analyzing the constitutionality of a challenged government procedure that allegedly deprives individuals of liberty or due process rights.

See page 13 of App. B.

After the *Endicott* ruling in 1924, Congress enacted the Social Security Act along with a provision 42 U.S.C. § 407 which provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

It is this federal law that makes the *Endicott* ruling outdated (see *Finberg v. Sullivan*, 634 F.2d 50, 56(3rd Cir. 1980) and suggests a need for a current Supreme Court ruling addressing the constitutional questions of Due Process Clause and Supremacy Clause violations as they relate to garnishment notices and the exemption of social security benefits. This issue is very broad based since the Social Security Act affects the majority of Americans.

Congress has specifically set out in federal law that these benefits are exempt from garnishment. The social security exemption mandates and garnishment statutes present important constitutional rights questions that conflict with the administration of the Social Security Act.

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[1] It may be noted that neither *Mathews* nor the Supreme Court cases from which it evolved dealt with the due process rights of postjudgment debtors.

The Appellant contends the twenty five (25) day notice provision of the Florida garnishment statute is no notice at all. It is neither timely nor informative in plain easy to understand language. The garnishment "takes" the recipient's exempt benefits and maybe 25 days later the debtor will get a official notice from the creditor's attorney. The notice does not inform the debtor of the little known exemption mandates concerning Social Security and Veteran's benefits. It requires the debtor to take immediate legal action or forfeit their funds.

The Florida garnishment scheme insures the debtor is immediately impoverished and left uninformed of their rights in the garnishment action. A prompt and informative notice would resolve this situation.

After the exempt funds were garnished, the Appellant's experience was total chaos. "A.N.B." acted on the invalid writ, bounced two previously paid checks and intended not to pay the remaining 26 outstanding checks. Their policy was to remove the N.S.F. fees from the proceeds, then contrary to the writ's instructions, send the balance directly to the creditor's attorney.

No amount of pleading with "A.N.B." could get them to comply with the law. Their attitude was pure prejudice against the debtor. Only after hiring an attorney and paying his fee up front, with funds that had to be borrowed by the social security recipient, did "A.N.B." abandon the illegal garnishment. The creditor's attorney, expecting a check from "A.N.B." refused to stop the garnishment. The creditor's attorney, when confronted with the question why was the writ issued out of jurisdiction stated "We throw it against the wall and see if it sticks. You'd be surprised how often banks send us the money."

There is absolutely no reason why Florida needs twenty five (25) days to provide an official notice to debtors. Banks are not required to inform the debtors of any thing more than a nonsufficient funds notice. The whole process is outdated. The debtor has no idea who directed the writ. The seizure of the bank account takes all the funds for the necessities of life. In contrast, garnishment of wages is limited to 25%. See *Finberg v. Sullivan*, 634 F.2d 50, (3rd Cir. 1980). It is that difference that makes the debtor's interest compelling over the creditor's interest when applying the *Mathews* balancing test.

The Florida garnishment scheme provides the creditor an incentive to garnish the debtor's exempt benefits. Section 77.055 requires the defendant to assert the exemption or be in default. Federal law prohibits the attachment of the funds but the Florida law provides a means to circumvent these exemption mandates.

It is that provision in the Florida garnishment statute that the creditor's attorney insisted allowed for the garnishment of Social Security funds. The creditor's defense in the wrongful garnishment claim was "If the debtor doesn't assert the exemption, we are by Florida law entitled to keep the funds".

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE PRIOR RULINGS BY THE FIRST, THIRD, AND FOURTH COURT OF APPEALS ON AN IDENTICAL CONSTITUTIONAL CHALLENGE TO A DEFECTIVE STATE GARNISHMENT STATUTE. THOSE COURTS OF APPEALS FOUND VIOLATIONS OF THE DUE PROCESS CLAUSE AND THE SUPREMACY CLAUSE FOR FAILING TO PROTECT ASSETS THAT HAVE BEEN DECLARED EXEMPT FROM GARNISHMENT. ALSO, ALL THE THREE COURT OF APPEALS FOUND THE SOCIAL SECURITY RECEIPIENT DID HAVE STANDING TO BRING AN ACTION FOR DECLARATORY RELIEF REGARDLESS OF THE FACT THE EXEMPT FUNDS WERE RELEASED FROM GARNISHMENT.

Finberg, supra, the Third Circuit Court of Appeals was the first Circuit Court to confront the question of what amount of due process should be afforded to a social security recipient whose benefits which are exempt are garnished. *Finberg* offers the most detailed analysis of the constitutional questions raised in this writ. In an *en banc* decision the *Finberg* court stated:

> Pennsylvania post judgment garnishment procedures, which permitted creditor to take **15** days to respond to petition to set aside

> garnishment, did not require hearing with sufficient promptness to satisfy requirements of due process, and failure of prescribed notice to inform social security recipient of exemptions that might apply to her property and of process for claiming such exemptions also violated social security recipient's due process rights, and thus procedures for postjudgment garnishment of social security recipient's bank account were unconstitutional.
>
> Pennsylvania procedures for postjudgment garnishment of bank accounts conflicted with section of Social Security Act exempting benefits from execution, levy, attachment, garnishment, or other legal process, and thus such procedures were invalid under supremacy clause.

In 1983, the Court of Appeals for the Fourth Circuit in *Harris v. Bailey*, 675 F.2d 614 (4th Cir. 1983), found there was a justifiable controversy with respect to Mrs. Harris, the judgment debtor-social security recipient, under the "capable of repetition, yet evading review" doctrine of *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911).

These holdings are in conflict with the recent Court of Appeals for the Eleventh Circuit's ruling below. Furthermore, the *Harris* court ruled:

> Virginia postjudgment garnishment procedures violated due process right of social security recipient whose bank account, containing proceeds from social security checks, her only source of income, was seized, and who did not receive garnishment notice until **six days** after service on garnishee bank, was not afforded notice that social security benefits were exempt from state garnishment proceedings and was not afforded appropriate hearing; balancing of creditor's and debtor's rights required that notice to debtor be served in a timely manner, either simultaneously with or within reasonable time after garnishment, that notice apprise debtor of procedure for asserting exemptions or contesting garnishment, and that hearing be conducted within meaningful time.
>
> Virginia postjudgment garnishment procedures, permitting judgment creditor to freeze social security recipient's bank account without

> regard to whether account contains social security funds, which, under federal law, are exempt from judgment are invalid under the supremacy clause.

In 1985, The United States Court of Appeals for the First Circuit in *Dionne v. Bouley*, 757 F. 2d. 1344 (1st Cir. 1985) states:

> Challenge to Rhode Island postjudgment attachment procedure was capable of repetition, yet evading review so as not to be moot even though plaintiff's bank account was released at or before time she filed action.
>
> Due process was not afforded by Rhode Island postjudgment attachment procedure which failed to provide judgment debtor with prompt and adequate informative notice that her property had been attached, of existence of exemptions to which she might be entitled or of means available for asserting such exemptions, and which lacked express provision for prompt postattachment hearing at which to assert any exemption.

On pages 6 and 7 of App. B, the Court of Appeals for the Eleventh Circuit stated "the facts alleged in the complaint are sparse". The Court of Appeals said they were looking for facts that speak to future injury. Facts by definition only speak to what actually happened and not to a future event. However, the facts were sufficient for a ruling on the merits by the District Court. The amended complaint was supported by affidavits sufficient to meet the standing requirements. The District Court also was aware of two unsatisfied judgments through the pleadings.

Both the Middle District of Florida and the Court of Appeals for the Eleventh Circuit were silent on the alleged supremacy clause violation.

Notice of seizure, or attempt to seize, property of a debtor is a fundamental element of due process. *Deary v. Guardian Loan Co., Inc.*, 534 F.Supp. 1178 (S.D., N. Y.1982).

The constitutional issues of due process and supremacy clause violations are not identical issues. **Prompt** notice is the essential deficiency in the due process violation. The supremacy clause violation is more than notice.

In determining whether state law violates the supremacy clause requires the court to examine first the purpose of the federal law and, second, the effect of operation of state law on those purposes. Neither court, the Middle District of Florida nor the Court of Appeals of the Eleventh Circuit, in their rulings examined the Florida law in relationship to the alleged supremacy clause violation. The appellant contends both courts erred by not addressing the alleged supremacy clause violation set out in the amended complaint.

In balancing creditor and debtor rights it should be recognized that the creditors have a significant advantage over debtors in the debt collection process. First, the creditor can compel the debtor annually to disclose their assets at discovery. The creditor's attorney can review the debtor's tax returns, income source, and actually look into the debtor's checking account in detail going back over several years.

Also the creditor is allowed by law to review the debtor's credit reports which today are very sophisticated and detailed. Then the creditor can apply even more pressure on the debtor by requesting a contempt of court hearing for anything the creditor dislikes about the discovery process.

Finally, the harshest of all of the creditor's tools is the writ of garnishment because it "takes" all the debtors money. It causes havoc to his bank account, inflicts financial damage by the high cost of penalties and possibly could result in an arrest for bouncing checks. Or worse yet, cause the dependant wife, an innocent party, to get arrested on worthless check charges.

Prompt notice is the only solution. In view of the overwhelming case law directly on point by three Courts of Appeals and the large number of veterans and social security recipients in Florida, the state of Florida should follow the example set by the Arizona legislature (See *Neeley v. Century Finance Co. of Arizona*, 606 F. Supp. 1453 (D.C.Ariz. 1985)) and change the law to provide a prompt notice of the garnishment action.

CONCLUSION

The merits of this case including the fatal issue of standing have previously been decided by the First, Third, and Fourth United States Court of Appeals. The ruling by the Middle District of Florida is not, in fact, a ruling on the merits because the court omitted the core argument, the 20 days the garnishee has to answer the writ of garnishment. The Appellant complains this omission is not only an error but prejudicial to a true ruling on the merits. The 20 days is significant because in an Arizona ruling, 20 days was too long (see *Neely*, page 1455), a Pennsylvania ruling found 15 days was too long (see *Finberg*, page 51), and a Virginia court found 6 days was not a prompt notice (see *Harris*, page 972). The Florida garnishment scheme does not provide an official notice for 25 days. It is clear that Florida is outside the existing rulings on an identical constitutional challenge to a defective state garnishment statute.

In a legal sense it is especially noteworthy that the United States Court of Appeals for the 11th Circuit did not affirm the Middle District of Florida Court's ruling as rendered on April 20, 1998. The Court of Appeals ruled independently that the Appellant now lacked standing to bring an action for declaratory relief. See page 5, App. B.

In their ruling the Court of Appeals opined that the exempt funds were returned and it is unlikely the bank or creditor would attempt any future garnishment action. The appellant contends this rationale is irrelevant to the issue of standing. It is the rationale for mootness, which was also decided by the sister Court of Appeals. This **published** ruling now has entangled two separate and distinct legal concepts of mootness with standing. This entanglement will bar any future challenges to the defective Florida garnishment statute since the return of the exempt benefits will deny standing to challenge this constitutionally defective state statute.

Thē pro se Appellant asks this Honorable Court to bring constitutional uniformity to the circuits. The Appellant respectfully request this Court rule on the merits of this constitutional challenge to a defective state garnishment statute. The Appellant's claims are fully supported in great detail in the rulings of the First, Third, and Fourth United States Court of Appeals. Those

Courts of Appeals found that all three Social Security recipients did indeed have standing, as did the Middle District of Florida in the instant case. Furthermore, due process does require a prompt official notice and the respective state statutes did violate the Supremacy Clause of the United States Constitution by failing to protect assets declared exempt from garnishment.

Florida is home for millions of veterans and social security recipients who could be subjected to this defective (notice wise) Florida garnishment statute. The State of Florida and the creditor have no compelling need for a twenty five (25) day notice provision. The solution is to provide a prompt notice as adopted by other states so veterans and social security recipients will have a prompt notice of the seizure of their exempt benefits and a procedure that will timely release their exempt funds from garnishment.

This case would allow the Supreme Court to bring uniformity to the circuits on an identical constitutional issue. Also, a Supreme Court ruling could underscore the little known veterans and social security exemptions mandates and visit an issue that adversely impacts thousands of recipients and their dependents that rely on these benefits for their basic necessities of life.

Respectfully submitted,

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